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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RONALD PORCO et al.,

Plaintiffs and Respondents,

v.

MARISA HELM, as trustee,

Defendant and Appellant.

2d Civil No. B211138
(Super. Ct. No. P078447)
(Ventura County)

Marisa Helm appeals from judgment entered after the probate court granted an unopposed motion for judgment against her and in favor of her brothers, Carmen Porco and Ronald Porco (respondent). (Prob. Code, § 17200, subd. (a).) Appellant contends the judgment must be reversed because the court committed error when it (1) denied her request to continue hearing, (2) denied her motion for relief from judgment, (3) denied her motion for reconsideration, (4) did not consider her objections to a proposed statement of decision, (5) found that she committed fraud and breached her fiduciary duties without sufficient evidence, (6) awarded excessive damages, and (7) awarded attorney's fees on a statutory ground not alleged in the petition. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Estacio Porco was the father of appellant and respondents. He died on October 16, 2003. Before his death, he gave power of attorney to appellant and made her trustee of his trust. Thereafter, his home was encumbered by a series of loans. It was eventually sold through foreclosure.

In August 2004, respondents served her with a petition to remove her as trustee and for damages. They alleged that she had committed fraud and breached her fiduciary duties, enriching herself with loan proceeds at her father's expense. In September 2004, appellant responded to the petition, denying those allegations. She also executed a quitclaim deed that gave her interest in her home to her husband. Respondents amended their petition to add the alleged fraudulent transfer.

The case was initially set for trial in March 2005. It was continued at least six times to November 17, 2006, because of appellant's health problems and other factors. Appellant was first deposed in January 2006.

Appellant did not appear for trial on November 17, 2006. Her counsel requested another continuance. He reported that she was ill, recovering from surgery. The parties stipulated on the record that the case would be decided on declarations, without oral testimony, through a motion for judgment after further deposition of appellant. Respondents would file the motion after the deposition. As part of the stipulation, appellant's counsel agreed to the admissibility of respondent's exhibits.

Appellant's second deposition session was completed in January 2007. Respondents filed their motion for judgment on June 18, 2007. The motion was supported by the stipulated exhibits, three affidavits, and the two transcripts of appellant's deposition. Appellant filed no opposition before the July 19 hearing, no evidentiary objections and no request for extension or continuance.

At the hearing, appellant's counsel orally requested a continuance. He stated that appellant had been unable to review the moving papers and declarations. The court denied the request and granted the motion for judgment.

The court expressed concern about a lack of corroboration for appellant's health problems. "[T]here ha[ve] been numerous requests to continue this matter, and previously the request has come because [of] alleged problems with health. And thus far I've been prepared to take the parties at their word but I've never received any corroborating data." The court went on to say, ". . . I'm skeptical that [Ms. Helm] is not being honest with respect to [her] alleged health problems. If she were, it would be easy to . . . substantiate." The court stated that it would grant the motion for judgment, and that appellant could seek relief pursuant to Code of Civil Procedure section 473 if appropriate.

Respondents prepared a proposed statement of decision, as directed by the court. Appellant filed timely objections challenging the sufficiency of the evidence to support the proposed findings and arguing that the evidence did not establish she used the loan funds for anything other than her father's care. (Cal. Rules of Court, rule 3.1590(f).)

In August, appellant filed a request for relief pursuant to Code of Civil Procedure section 473 from the July 19 order granting judgment.¹ She requested leave to file attached declarations from herself and her children and asked the court to reopen the case. She declared that she had been "mentally and physically unable to assist" her attorney in the month before the opposition was due and that unspecified health "conditions cause [her] to be unable to concentrate and focus so as to be able to prepare meaningful factual responses."² She submitted a letter from a clinical psychologist, Frank Zizzo, Ph.D., dated July 24, 2007 (after the opposition was due), which stated "Marisa Helm is my patient. She was last seen on this date. She complains of severe

¹ As her counsel later explained, her motion was "inaccurately" titled, "notice of motion for order granting motion for judgment and to allow filing of opposition thereto." It was intended to be a "motion for relief under 473 and on equitable grounds, relief from the Court's order granting the motion for judgment."

² She explained in her proposed opposition declaration that she has suffered from panic attacks and agoraphobia since 2002, the year her father's house was lost in foreclosure.

depression, panic attacks, anxiety, sleep disturbance, and poor concentration and memory. [¶] Ms. Helm has been treating with Frank Minero MD for approximately two years. Dr. Minero has prescribed Zoloft 100mg, Xanax .25 mg, and Ativan .25 mg prn for these symptoms. Even with the medication, Ms. Helm remains easily distracted and complains of poor concentration and memory. She communicates difficulty with personal and social relationships, and tends to isolate herself when experiencing stress. [¶] Ms. Helm's psychological condition as a result of the anticipatory anxiety of the court process in addition to her other long standing problems resulted in her inability to answer the court in a timely manner by July 19, 2007. [¶] She states that she will complete this required paperwork by July 30, 2007."

On September 5, 2007, the court heard and denied appellant's request for relief. The court noted that Dr. Zizzo had not identified which facts in his letter, if any, were based on personal knowledge and that there was no submission by Dr. Minero. The court found that appellant had not presented sufficient evidence to justify the requested relief.

Ten court days after her request for relief was denied, appellant filed a motion for reconsideration on the ground that she had new evidence that had not been available to her at the September 5 hearing.³ The new evidence was a "new, improved declaration of Dr. Zizzo," as her counsel described it, which had been revised to address the problems with the letter. Dr. Zizzo declared essentially the same facts, but now identified the source of his information in some places.

On November 28, 2007, the court denied appellant's motion for reconsideration. The court issued its statement of decision on December 3, 2007, over appellant's objection and entered judgment on April 8, 2008, after granting respondents' motion to fix the amount of attorney's fees and costs.

³ The motion was entitled, "notice of motion for order reopening trial for additional evidence and reconsideration of ruling/order on prior motion to set aside order granting motion for judgment." Appellant's counsel explained at the hearing that it was intended to be "a motion for reconsideration and to reopen the case for trial."

The court found that appellant "committed fraud in the taking of her father's property and the property of her father's trust." The court found that appellant took more than \$146,800 from her father's bank account. It awarded one-third of that amount to each respondent with interest. The court also found that in the absence of appellant's fraud, their father's home would have been worth \$530,000 on the date of his death, and awarded one-third of that amount to each respondent, also with interest. The court set aside the quitclaim deed by which appellant had transferred her interest in her home to her husband and awarded costs in the amount of \$2,824 and attorney's fees in the amount of \$46,480.00.

DISCUSSION

Denial of the Request to Continue Hearing on the Motion for Judgment

Appellant contends that the trial court should have granted her request to continue the July 19, 2007, hearing on the motion for judgment. She argues that a party's inability to appear constitutes good cause for continuance and that it was unfair that respondents had eight months to prepare their motion whereas she had only one.

We uphold a trial court's denial of a request for continuance absent abuse of discretion. (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242.) The trial court abuses its discretion if it exceeds all bounds of reason. (*Id.* at p. 1246.) There was no such abuse here.

A party seeking continuance of a trial date must do so by noticed motion or ex parte application supported by declarations demonstrating good cause. (Cal. Rules of Court, rule 3.1332(b).) Appellant did not. The request must be made as soon as reasonably practical (*ibid.*), but it was not. Appellant waited until the day of the hearing to request more time. The court acted within its discretion when it determined there was no good cause for continuance. Counsel's representation that appellant was unable to participate was not supported by any declaration. Appellant had been granted numerous prior continuances for the same reason. Furthermore, appellant waived her contention that the briefing schedule was unfair when she stipulated to it. The stipulation allowed respondents to "prepare" a motion after appellant's second deposition and imposed no

deadline for doing so. The time for opposition, reply and hearing were triggered by the filing of the motion.⁴

Denial of the Request for Relief from the Order Granting Motion for Judgment

Appellant contends that the court erred when it denied her request for relief from judgment pursuant to Code of Civil Procedure section 473, subdivision (b) or on alternative equitable grounds, because her failure to file an opposition was the result of her excusable neglect. We disagree.

The trial court has discretionary power to grant relief from a judgment that is taken against a party through their mistake, inadvertence or excusable neglect. (Code Civ. Proc., § 473, subd. (b).) A request for relief is addressed to the court's sound discretion and we will not disturb its decision absent a clear showing of abuse. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 897-898.) Due diligence is a prerequisite to relief and inexcusable neglect prevents relief. (*Luz v. Lopes* (1960) 55 Cal.2d 54, 62.) Appellant was not diligent. She offered her own declaration and a letter declaration from Dr. Zizzo both of which stated that her medical condition had prevented her from helping counsel prepare an opposition brief. Putting aside the evidentiary shortcomings of Dr. Zizzo's letter declaration, there was no explanation for appellant's failure to bring the problem to the court's attention before the hearing on the motion for judgment. The court did not abuse its discretion when it found that appellant had not met her burden for obtaining relief from her default.

Denial of Motion for Reconsideration

Appellant contends that the court erred when it refused to reconsider its order denying relief from default based on the revised declaration of Dr. Zizzo. We reject the contention.

⁴ Appellant is incorrect when she asserts that the parties were to agree on a hearing date. After entering into the stipulation, her counsel asked whether the parties should "arrange for a hearing" when the case was ready to submit. Counsel for respondents noted, "We will obtain a hearing date when I file my moving papers," and the court responded, "Perhaps that is a better way to go."

An order denying a motion for reconsideration is not an appealable order. (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 1633.) Even if it were, we would find that the court acted within its discretion when it denied the request. Where a request for reconsideration is based on new and different facts, the party seeking reconsideration must demonstrate that they were not aware of the facts at the time of the original ruling and must provide a satisfactory explanation for failing to offer the evidence at the original hearing. (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468.) The only facts contained in Dr. Zizzo's declaration pertained to appellant's medical condition. Appellant was aware of her own medical condition at the time of the hearing on the motion for judgment and the hearing on her request for relief from default, as evidenced by her own declaration and by her deposition testimony in 2006 and 2007. She offered no satisfactory explanation for failure to offer the revised declaration at the original hearing.

Rulings on Objections to Proposed Statement of Decision

Appellant asks us to assume that the trial court did not consider her objections to the proposed statement of decision because the record does not reflect consideration of those objections. She also asks us to presume that the court did not critically consider the evidence against her. We decline.

We begin with the fundamental presumption that the judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Appellant has the burden to overcome this presumption with an appellate record that is adequate to demonstrate error. (*Ibid.*) A trial court may, but is not required to, conduct a hearing on objections to a proposed statement of decision. (Cal. Rules of Court, rule 3.1590(k).) There is nothing in the record to contradict the presumption that the trial court considered appellant's objections and considered all of the evidence before it issued the statement of decision.

*Sufficiency of Evidence to Support Findings of Fraud
and Breach of Fiduciary Duty*

Appellant contends that there was insufficient evidence to support the court's findings of fraud and breach of fiduciary duty. We reject the contention.

We must affirm the trial court's resolution of factual issues if they are supported by substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) It is appellant's burden to demonstrate that they are not. The absence of a brief from respondents does not lighten appellant's burden. (*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226-227.) Substantial evidence is evidence that is of ponderable legal significance. It must be reasonable, credible and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) We will not reverse a finding based on erroneously admitted evidence unless the record reflects a timely and specific objection to the evidence made in the trial court. (Evid. Code, § 353, subd. (a).)

Appellant contends that respondents' supporting declarations contained hearsay and were insufficient to prove fraud or breach of fiduciary duty. Her objections to the declarations were waived by her failure to object before the hearing on the motion for judgment.

Substantial evidence in the record supports the trial court's findings of breach of trust, fraud, breach of fiduciary duty, and fraudulent transfer. In addition to the declarations, the motion for judgment was supported by appellant's own deposition testimony and the exhibits to which she stipulated. The exhibits included loan and foreclosure records, a summary of bank records, correspondence and an appraisal. Appellant's testimony established that she took over management of her father's finances after her mother died in 1987. Documents established that he gave her power of attorney in 1999, and he made her trustee of his trust in 2002.

The evidence showed that before appellant's mother died, the house was encumbered only by a \$28,000 note from 1980. In 1991 and 1995, appellant helped her father take out loans against the house for \$60,000 and \$35,000 respectively. She was unable to satisfactorily explain the need for these loans. In 1999, appellant used her

power of attorney to take another loan for \$150,000.⁵ A few months later she helped her father take out a loan for \$20,000. The summary of bank records, which was admitted by stipulation, showed that the loan proceeds were deposited into an account that appellant shared with her father and were then transferred in large amounts to appellant's own accounts or withdrawn directly as cash or by cashier's check.

In 2001, the loan payments became delinquent. The house went into foreclosure, as evidenced by a recorded notice of default. Records and deposition testimony establish that appellant entered into a series of forbearance agreements on behalf of her father, but defaulted on each. It does not appear from any document that her father or her brothers knew of these defaults and agreements. The lender dealt with appellant, not her father, according to its telephone records. It sent the forbearance documents directly to her home. She testified that she was receiving all of her father's mail. Appellant claimed in deposition testimony that her father knew about the defaults and was responsible for them because he failed to send mortgage check's that she had written or because he overdrew his account by withdrawing cash. The trial court could rationally discredit this claim. There was no evidence to corroborate cash withdrawals by her father, there were many inconsistencies in her deposition testimony and it was undisputed that her father was unable to drive himself to the bank after 1999 when he lost his license. We do not weigh the evidence or decide the credibility of the witnesses. Where two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the trial court. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

Appellant testified that she did not tell her brothers about the defaults. She said her father told her not to. Appellant testified that she became ill with panic attacks in 2001, during the foreclosure process. She conceded in deposition that she neglected her father's finances thereafter.

⁵ The 1991 note for \$60,000 was repaid as part of this \$150,000 loan. The 1995 note for \$35,000 was not.

In 2002, the home was sold in foreclosure proceedings. Appellant negotiated a lease directly with the buyer and her father was able to stay in the home by paying rent and back property taxes to the buyer. Her father did not sign the lease and there is no documentary evidence that he or appellant's brothers knew his house had been foreclosed upon. After the foreclosure sale, a check for the excess proceeds in the amount of \$136,935.03 was mailed to appellant's home. It was deposited into the account she shared with her father. Large cash withdrawals, cashier's checks and transfers followed immediately. In deposition, appellant acknowledged these transfers and withdrawals. No money was left in the father's account when he died in 2003.

Appellant gave contradictory and unsatisfactory explanations for the loans and the missing funds. For example, she testified that the 1991 and 1995 loans for \$60,000 and \$35,000 were taken out to pay off the initial note, or to get a better interest rate, or so that her father could buy a car, or to pay her mother's medical bills. The initial note was for only \$28,000 and was at least 12 years old, she acknowledged that her father never bought a new car and that he lost his license in 1999, and she was unable to identify or estimate the medical bills. She could not explain where \$26,000 went in the three days after the foreclosure excess proceeds were deposited. She testified that all of the loan funds were used for her father's monthly expenses because they exceeded his monthly income, but she was unable to identify monthly expenses exceeding his income or to identify extraordinary expense that could explain the withdrawals and transfers.

A quitclaim deed and appellant's deposition testimony establish that she transferred her interest in her home to her husband as a gift within a month of service of the petition in this case. She stated that she did so because she was refinancing, but a rational trier of fact could infer from the circumstances that the intent of the transfer was to defraud potential creditors in this action. After reviewing all of the evidence that was submitted, without objection, in support of the motion for judgment we are satisfied that each of the findings in the statement of decision was supported by substantial evidence.

Amount of Damages Awarded

Appellant's contention that the court awarded excessive damages is without merit, in view of the summarized bank records, the appraisal and appellant's own deposition testimony. Moreover, her claim is precluded because she did not first urge the error in a timely motion for new trial pursuant to Code of Civil Procedure section 657, subdivision (5). "A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court." (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719.)

Attorney's Fees

Appellant contends that the fee award must be reversed because the petition did not request fees pursuant to Welfare and Institutions Code section 15657.5 (elder financial abuse). We reject the contention because it is raised for the first time on appeal.

Where a party allows a case to be tried on the assumption that certain issues are raised by the pleadings, she may not assert otherwise on appeal. (*Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 392.) In their petition, respondents requested "such attorney's fees as may be allowable by law." In their motion for judgment, they requested fees pursuant to Welfare and Institutions Code sections 15610.30, subdivision (a) and 15657.5, subdivision (a) (elder financial abuse) based on evidence that appellant had financially abused their father by fraudulently taking his property. Appellant did not oppose the motion.

Appellant also did not challenge the basis for the fee award in her request for relief from default or in the accompanying proposed opposition papers. Respondents' proposed statement of decision included a finding that they were entitled to fees pursuant to Welfare and Institutions Code sections 15610.30, subdivision (a) and 15657.5, subdivision (a), but appellant's objections to the statement of decision did not challenge that proposed finding. Similarly, her opposition to respondents' motion to fix the amount of fees and costs did not challenge the basis of the award; it only challenged the amounts claimed.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Kent Kellegrew, Judge
Superior Court County of Ventura

Alfred R. Keep and Lynn Romano, for Defendant and Appellant.
No appearance for Plaintiffs and Respondents.